

# Military Justice

## CHAPTER 3

The rules of military justice stem from many sources. This chapter describes these sources; the roles of the commander, the staff judge advocate, the military judge, and the members of the court-martial; and the rights and procedures involved in nonjudicial punishment.

### SOURCES OF AUTHORITY

The rules governing military justice and military criminal law come from the following sources:

- **The Constitution of the United States.** The Constitution is the basic authority for the military criminal justice system in the United States Army. It allows Congress to make a separate military justice system.
- **The Uniform Code of Military Justice.** Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, thereby replacing the Articles of War from 1775. The UCMJ is a federal law that establishes our present system of military criminal justice. It describes what conduct is criminal and the types of courts and basic procedures used to process military criminal cases. The UCMJ is found in 10 United States Code, §§801-940 and in Appendix 2 of the Manual for Courts-Martial (MCM), United States, 1984.
- **The Manual for Courts-Martial (MCM), United States, 1984.** The MCM details the rules for military justice and has the force and effect of law. In passing the UCMJ, Congress gave power to the President of the United States to establish military criminal procedures. The President did this by publishing the MCM. It explains military crimes, contains the rules of evidence, and sets forth rules for conducting courts-martial.
- **Army regulations.** The Secretary of the Army has authority to issue regulations, in addition to the UCMJ and MCM, that administrators of military justice must follow. For example, AR 27-10 covers the administration of military justice.
- **The United States Army Court of Military Review.** The Court of Military Review is the first appellate court in the military justice system. The court members are appellate military judges in the ranks of colonel and lieutenant colonel. In reviewing courts-martial convictions, the United States Army Court of Military Review issues written opinions, which are binding on Army courts-martial. A civilian, personally retained lawyer or an appellate defense counsel appointed by The Judge Advocate General may represent the accused.
- **The United States Court of Military Appeals.** The Court of Military Appeals is the highest appeals court within the military justice system. Effective 1 October 1990, it consists of five civilian judges appointed by the President of the United States. It is comparable in position and authority to a state supreme court and hears appeals on decisions of the United States Army Court of Military Review. It also issues written opinions containing rules on military justice. The Military Justice Act of 1983 allows decisions made by the Court of Military Appeals to be appealed to the United States Supreme Court.
- **The United States Supreme Court.** The Supreme Court is the highest court in the United States. It consists of nine justices whom the President appoints to life terms and the Senate confirms. It hears appeals from federal circuit courts, state supreme courts, and the Court of Military Appeals. The Supreme Court provides authoritative interpretations of the United States Constitution and usually hears only those cases that present significant legal issues.

## MILITARY ROLES

The following paragraphs address the roles of the commander, the staff judge advocate, military judges, and court members in the military justice system.

### THE COMMANDER

The unit (company, battery, troop, detachment, and so forth) commander is usually the first to learn of misconduct that might give rise to administrative action, nonjudicial punishment, or court-martial charges. He must promptly investigate the circumstances of an alleged crime and decide what to do about it. In deciding what to do, the commander must consider the seriousness of the offense, your past record and your potential for further useful service, and the state of morale and discipline in the unit. He must decide whether to refer the matter up the chain of command or dispose of it within the unit by administrative action or by UCMJ, Article 15 (nonjudicial punishment). If he forwards a case to a superior, that officer will apply the same criteria in deciding whether to take appropriate action or to forward the case still higher. Each commander is responsible for both enforcing the law and protecting your rights.

### THE STAFF JUDGE ADVOCATE

The staff judge advocate (SJA) of the unit's division or post has a duty to see that criminal justice in the command is carried out properly and fairly. The SJA advises commanders at every level about their handling of cases. Judge advocates, all fully qualified lawyers, advise and represent soldiers accused of crimes. Although available through the office of the staff judge advocate, they are assigned to a separate organization, the United States Army Trial Defense Service (USATDS or TDS).

### MILITARY JUDGES

Military judges are assigned to sit on all general and most special courts-martial. These individuals are experienced lawyers with training as military judges. They decide questions of law, instruct the court members on law that applies to the case, and ensure that the trial is conducted legally.

### COURT MEMBERS

The commander selects active-duty soldiers to act as court members. An enlisted accused may request that enlisted soldiers hear his or her case. In such an instance, at least one-third

of the members of the court will be enlisted. They may not, however, be from the same unit as the accused. All members of the court have an equal voice and vote. The accused has the right to challenge any member on the court, including the judge, if the member or judge is not impartial. The accused may also challenge one member of the court without reason. Any member successfully challenged takes no further part in the trial.

## RIGHTS AND PROCEDURES

The following paragraphs address your rights as a soldier and the procedures that must be followed in the administration of military justice.

### RIGHTS OF SOLDIERS

You have many basic rights under military criminal law, including—

- The right to a defense lawyer.
- The right to due process of law.
- The right to remain silent.
- Rights under the law of search and seizure.

### Defense Lawyer

The Army provides a fully qualified military defense lawyer free of charge to any soldier facing special or general courts-martial. As your representative, the lawyer acts in your interest, advising and defending you to the best of his ability. Discussion about a case between you and your attorney is confidential under the attorney-client relationship. This means that the lawyer may not reveal what you have told him without your permission. If you are facing court-martial, you also have the right to have a civilian lawyer, but you must pay this cost or obtain the services without cost to the government. If you are not facing a special or general court-martial, you may still get advice from an Army lawyer on military criminal matters by contacting the local office of the staff judge advocate or Trial Defense Service office.

### Due Process

Due process of the law provides that, at trial, you have the right to confront and cross-examine all the witnesses against you. You also have the right to present evidence on your own behalf. You may not be found guilty of a crime until the government proves beyond a reasonable doubt that you committed the crime. A finding of guilty

may be made only after a court has heard all the evidence relating to your guilt or innocence.

### Remaining Silent

The UCMJ provides that if you are suspected of a crime, you may not be forced to speak against yourself. Before questioning, you must be advised of your right to remain silent. Also, if you are in custody, you must be told that you have the right to speak to a lawyer and have a lawyer present during questioning if you choose to answer questions.

### Search and Seizure

The Fourth Amendment to the Constitution of the United States and the MCM govern examination of your person or property to discover and remove evidence. Military criminal law requires strict compliance with the Constitution and the MCM. Searches are permissible only under limited circumstances such as the following:

- **Search authorized by a commander.** A commander may order a search of your person or property when you are a member of his command. The decision to conduct a search, which may be reviewed by a court-martial, must be based upon probable cause.
- **Search incident to apprehension.** A person legally apprehending you may search you and your immediately available property. The property must be in your immediate control at the time of your apprehension.
- **Consent to search.** A search is lawful when made with your free and voluntary consent.
- **Search to prevent removal of criminal evidence.** If evidence of a crime is in danger of removal or destruction, and if time is not available to secure a commander's permission to search, a lawful search may be made.
- **Inspection for military readiness.** The commander has the authority to determine the military readiness of soldiers, organizations, and equipment. Evidence of a crime discovered during an authorized inspection may be seized and admitted as evidence at a court-martial.

### PROCEDURES FOR COURT-MARTIAL

The Army's court-martial system includes—

- **Summary court-martial (SCM).** This type of court-martial is composed of one commissioned officer who tries minor crimes. The

maximum punishment depends upon your rank but may not exceed confinement for one month, forfeiture of two-thirds pay for one month, and reduction in rank. You may consult a lawyer concerning the case, but you are not entitled to have an appointed military lawyer present at the trial. You have the right to refuse trial by SCM.

- **Special court-martial (SPCM).** An SPCM consists of at least three court members. The defense counsel must be a lawyer. A military judge is normally appointed for the trial. The maximum sentence is confinement for six months, forfeiture of two-thirds pay per month for six months, and reduction in rank to the lowest enlisted grade. In some instances, the sentence may include a bad-conduct discharge (BCD).
- **General court-martial (GCM).** A GCM tries the most serious offenses. It consists of at least five court members and a military judge. Both the prosecuting (trial) and defense counsel must be lawyers. A formal investigation must occur before the trial. The GCM judge may sentence you to any punishment authorized by law.

Just as in other American criminal courts, courts-martial are adversary proceedings. That is, the government and the accused each present matters that apply to their sides and must follow certain rules in doing so.

In either a general or a special court-martial with a military judge, you may choose to be tried by the military judge without the members. If the judge alone tries you, he decides if you are guilty or innocent. If the judge finds you guilty, he also determines your sentence. If members find you guilty, they determine your sentence.

You may plead guilty or not guilty. If you do not make a plea, the judge enters a plea of not guilty. Before trial, you may possibly agree to plead guilty in exchange for a promise by the convening authority to approve only a certain sentence. This is called a *pretrial agreement*.

The person who ordered each trial reviews its result. Either the Judge Advocate General or the Army Court of Military Review may also review the court-martial conviction, depending on the type of court-martial and the punishment imposed.

You may appeal certain convictions to the Court of Military Appeals, which consists of three civilian judges. The United States Supreme Court may review its decisions.

Appendix C shows the maximum imposable punishments for the different types of court-martial.

### PROCEDURES FOR ARTICLE 15

Under UCMJ, Article 15, you may be punished for minor offenses. The punishment is nonjudicial because it is given by the commander instead of by a court-martial. If you are facing nonjudicial punishment, you have rights and must make important decisions.

The commander may give nonjudicial punishment only to soldiers under his command. Before punishing you under Article 15, the commander must make sure that—

- An offense was actually committed.
- The offense may be punished under the UCMJ.
- You committed the offense.
- Article 15 punishment is proper after considering the type of offense and your record.
- The proper type of nonjudicial punishment, formal or summarized, is selected.

The commander must tell you, in writing, that he plans to give you a formal Article 15. He will notify you using DA Form 2627, advise you of your legal rights, and tell you where to find the lawyer's office. You must be given a reasonable amount of time to see a lawyer. You have the following rights:

- To refuse the Article 15 (unless attached to or embarked on a ship) and demand trial by court-martial.
- To know the type of offense committed.
- To have a public hearing.
- To have the help of a spokesperson.
- To present witnesses.
- To present matters in defense, extenuation, and mitigation.
- To examine documents or physical objects to be used against you.
- To say nothing.
- To appeal.

Written notification of a summarized Article 15 is not required. The commander will record the proceedings using a DA Form 2627-1. Only enlisted soldiers may receive summarized Article 15 punishment. The punishment is limited to 14 days' extra duty, 14 days' restriction, an

oral admonition or reprimand, or any combination of these punishments. You must decide to accept or refuse a summarized Article 15 within 24 hours. You do not have a right to consult with a lawyer, bring a spokesperson to the hearing, or request an open hearing. You do receive notice of the nature of the offense and have the following rights:

- To present witnesses.
- To remain silent.
- To appeal.
- Unless attached to a ship, to refuse the summarized Article 15 and demand trial by court-martial.

Simply accepting the Article 15 procedure does not mean that you admit guilt. Rather, you agree to the use of the procedures of Article 15 to let the commander, instead of a court-martial, determine your guilt or innocence. If the commander determines that you are guilty, the type and amount of punishment the commander may impose under formal Article 15 procedures depends on his rank, your rank, and the size of the unit. (See Appendix C.)

A warrant officer, lieutenant, or captain may impose an Article 15 punishment. If a heavier punishment is warranted, the case may be sent to a field grade commander in the chain of command with a rank of major or above with a recommendation. The field grade commander may act on the recommendation or return the case to the lower commander for action. The superior commander, however, may not tell a subordinate commander when to give an Article 15 or how much punishment he should give.

A commander who gives an Article 15 has the power to grant you clemency. The commander may suspend your punishment for up to six months. The probation is an incentive to stay out of trouble. The original punishment is not effected unless the commander cancels your suspension due to further misconduct.

A commander may also reduce the amount or type of punishment when your conduct merits it. For example, he may reduce 14 days of extra duty to 10 days of restriction or 7 days of extra duty.

A commander may set aside a punishment when it is clear that the Article 15 should not have been given in the first place. You are then restored all your rights and privileges.

Every soldier who receives an Article 15 has the right to appeal. You may appeal if you believe that you are not guilty, if the commander did not follow the rules for giving an Article 15, or if the punishment is too severe. The commander who acts as the appellate authority normally is immediately superior to the commander who issued the Article 15. In other words, if a company commander issues the Article 15, the battalion commander will act as the appellate authority. An appellate authority may reject an appeal that is submitted more than 5 days after the commander imposes punishment.

In deciding what to do on appeal, the appellate commander may take any of the clemency

actions discussed earlier to lessen the punishment; he may not, however, increase the punishment. The appellate commander must refer an Article 15 appeal to the SJA for a legal opinion if the Article 15 contains any of the following punishments:

- Arrest in quarters of more than 7 days.
- Correctional custody of more than 7 days.
- Forfeiture of more than 7 days' pay.
- Reduction in rank from a pay grade of E-4 and above.
- Extra duty of more than 14 days.
- Restriction of more than 14 days.